No. 83-236

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1983

PORTLOCK COMMUNITY ASSOCIATION (MAUNALUA BEACH); KOKOHEAD COMMUNITY LEASE-FEE, INC.; WEST MARINA COMMUNITY ASSOCIATION; HAHAIONE VALLEY COMMUNITY ASSOCIATION,
Appellants,

vs.

FRANK E. MIDKIFF, RICHARD LYMAN, JR., HUNG WO CHING, MATSUO TAKABUKI and MYRON B. THOMPSON, Trustees of the Kamehameha Schools/Bishop Estate,
Appellees.

APPELLANTS' REPLY BRIEF

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SUMMARY OF ARGUMENT

Primarily we support the argument of appellants in Nos. 83-141 and 83-283 that the Hawaii Land Reform Act meets the "minimum rationality" test for federal review of state legislation. We here point out that, should a contrary view be taken, an evidentiary hearing is required before the statute can be held unconstitutional. In that case the special circumstances exist for abstention in eminent domain cases. We also answer appellees' new Fourteenth Amendment argument and show that appellees have not really come to grips with the cases holding that a state has broad powers to deal with recognized economic ills.

ARGUMENT

I

APPELLANTS FAILED TO MEET THE ARGUMENT THAT THE COURT OF APPEALS ERRED IN RELYING ON "EVIDENCE" AND IN REAPPRAISING THE FINDINGS OF THE HAWAII STATE LEGISLATURE

In our Brief on the Merits we pointed out that, in reappraising the findings of the Hawaii State Legislature, the pivotal concurring opinion below relied upon certain "evidence of record" and looked to findings of fact in a related case, 702 F.2d at 805, 806; Portlock A-38, 41.[1] Appellees' brief also relies on evidence to support its arguments. For example, appellees dispute what evidence was considered by the Hawaii Legislature, BR 7-8, n.22. Appellees make controversial assertions as to the reason for the leasehold system in Hawaii, BR 5-6. Appellees argue that the legislative justifications are nothing more than "rationalizations," BR 24; they assert that the legislative findings are no more than "creative rhetoric," BR 58; they assert that the legislative finding that the transfers of title will combat inflation is "baseless," BR 71; they assert that the statute is not aimed at eliminating concentration, BR 73; they make evidentiary assertions as to the effect of zoning in Hawaii, BR 74-75.[2] To support their Fourteenth Amendment due process argument they rely expressly on evidence "introduced below," BR 84, n.201. Clearly the Briefs of Amici Curiae, The Office of Hawaii Affairs and Queen Liliokalani et al., rely almost entirely on matters not of record.

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[1]References to appendices are: Separate Appendix to Jurisdictional Statement in No. 83-236, Portlock A-_____; Joint Appendix in Nos. 83-141, 83-283, JA-_____.

[2]References BR are to Brief for Appellees unless otherwise noted.

The problem with appellees' position is that the District Court did not permit plaintiffs-appellees at the trial to introduce evidence on the question of whether the taking was for a public use, 483 F.Supp. 65, 70; Portlock A-71, 72, 81-82. The court found the statute facially valid on the intervenors' motion for summary judgment, JA 93. Appellees demanded a trial in the District Court and argued in the Court of Appeals that it was error for the trial court to deny them an evidentiary hearing, BR 17. While we adopted the position of appellants in Nos. 83-141 and 83-283 that a federal court can review the instant statute only for minimum rationality, we pointed out that the legislative findings on public use could be rejected only after an evidentiary hearing, Portlock BR 13. Since appellees did not address this latter issue directly in their brief we assume that the cases cited by appellees on the propriety of invalidating condemnation statutes are those applicable on this point, Appellees' BR 63-64, n.162. Of these cases six held that there was public use.[3] One case involved only the question of removal jurisdiction of a condemnation action.[4] The rest of the cases relied on were not eminent domain cases.[5] Thus, appellees can cite no decision of this Court

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[3] *Shoemaker v. United States*, 147 U.S. 282 (1893) (facially valid); *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112 (1896); *Hairston v. Danville & Western Ry. Co.*, 208 U.S. 598 (1908) (facially valid); *Sears v. City of Akron*, 246 U.S. 242 (1918) (facially valid); *Rindge Co. v. Los Angeles County*, 262, 700 (1923) (facially valid); *United States ex rel. TVA v. Welch*, 327 U.S. 546 (1946).

[4] *Madisonville Traction Co. v. St. Bernard Min. Co.*, 196 U.S. 239 (1905).

[5] *Missouri-Pacific R.R. Co. v. Nebraska*, 164 U.S. 403 (1896) held unconstitutional a state statute requiring a railroad to permit an elevator to be constructed on its land but only after a complete admin-

that has overturned a condemnation statute on the grounds of lack of public use or public purpose without an evidentiary hearing. "No case is recalled where this court has condemned, as a violation of the 14th Amendment, a taking upheld by the state court as a taking for public uses in conformity with its laws." *United States ex rel TVA v. Welch*, 327 U.S. 546, 552 (1946) (quoting *Hairston v. Danville & Western Railway*, 208 U.S. 598, 607 (1908)). Appellees' brief refers to no case holding a condemnation statute unconstitutional on its face for failure of public use or public purpose, the approach adopted by the majority opinion in the court below and urged by appellees.[4]

Therefore, if the Court of Appeals did not affirm the judgment, it should have remanded for a hearing or with directions to abstain pending resolution in Hawaii courts.

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istrative hearing. *Block v. Hirsch*, 256 U.S. 135 (1921) upheld an act of Congress which gave tenants the right to hold over during an emergency period based upon the sufficiency of the Congressional findings. *Milheim v. Moffat Tunnel Improvement District*, 262 U.S. 710 (1923) upheld the constitutionality of an act creating a tunnel improvement district after trial proceedings appraising the benefits to plaintiff's real property. *Thompson v. Consolidated Gas Util. Corp.*, 300 U.S. 55 (1937) affirmed an injunction enjoining enforcement of prorate orders of the Texas Railroad Commission but only after an extensive record at a trial before a three judge court. *City of Cincinnati v. Vester*, 281 U.S. 439 (1930) was an eminent domain case, but it did not involve the validity of the statute; it affirmed an injunction restraining the condemnation of plaintiff's property on the ground that it was "excess condemnation" as not being needed for street widening but only after an evidentiary hearing in the District Court.

[4]Cases cited elsewhere by appellants are not in point: *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) held that permanent physical occupation is a taking but did not invalidate the statute. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) held a housing ordinance invalid based on undisputed factual representations. 431 U.S. 506, n.2.

II

APPELLEES HAVE FAILED TO MEET OUR ARGUMENT ON ABSTENTION

We pointed out that at the time of the decision of the Court of Appeals, the Hawaii Supreme Court had already determined that the validity under state and federal constitutions of the instant legislation could be determined only after an evidentiary hearing and that a trial pursuant to these decisions, but in another case which appellees herein were a party, was in progress. *Hawaii Housing Authority v. Castle,* 65 Hawaii 465, 653 P.2d 781 (1982), Portlock A-166; *Hawaii Housing Authority v. Brown,* Civ. No. 8489 (Hawaii S.Ct. 1982) Portlock A-163; Portlock BR Ex. 1. We also pointed out that there was a conflict between the Ninth Circuit and the Seventh Circuit as to abstention in eminent domain and land use cases, and that this Court had not addressed the issue. Portlock BR 16.[1] We also pointed out that there were special circumstances justifying abstention, such as were found in the concurring opinion in *Kaiser Steel Corp. v. W. S. Ranch Co.,* 391 U.S. 593 (1968). *Kaiser Steel* is important because there the state proceedings were not even commenced until after the initial decision of the Court of Appeals. In sum, we argued that a hearing being necessary before the statute could be held unconstitutional, the Court of Appeals should have reversed and remanded. Moreover, since a trial was already in progress in a state court on precisely these issues (Portlock BR Ex. 1) the District Court should have been ordered to abstain.

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[1]See, *Louisiana Power & Light Co. v. City of Thibodaux,* 360 U.S. 25 (1959); *County of Alleghany v. Frank Mashuda Co.,* 360 U.S. 185 (1959); *Ahrensfeld v. Stephens,* 528 F.2d 193 (7th Cir. 1975).

Appellees did not consider the special application of abstention to eminent domain cases, nor did they deny that the special circumstances for abstention as found in *Kaiser Steel* exist here. Instead, they attempted to distinguish *Kaiser Steel* on the ground that it involved public purpose under state law. BR 27, n.76. Appellees' distinction is correct but it is without a difference because this Court has repeatedly held that what is a public purpose for federal constitutional purposes depends upon facts with which the people and courts of the state are most familiar. *Fallbrook Irrigation Distict v. Bradley,* 164 U.S. 112, 115 (1896); *Clark v. Nash,* 198 U.S. 361, 369 (1905); *United States ex rel. TVA v. Welch,* 327 U.S. 546, 547 (1946).

Next appellees contended that the abstention point had been waived, although it is not clear that they even claimed that the waiver applied to the lessee appellants. In their waiver argument they make only a footnote reference to the lessee appellants. BR 31, n.84. Their principal argument seems to be that the Housing Authority raised the argument for the first time in this Court, BR 30-34.[8] In the first place, the waiver point has little merit because all three judges in the Court of Appeals actually considered the question of abstention on the merits. Appellees state that, ". . . Portlock only claimed that *Younger* was applicable in a supplemental post-oral argument memorandum. At no time did Portlock claim that any other abstention

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[8]Appellees' waiver cases, BR 30, n.83, all involve situations where abstention was either raised for the first time, or waived, in the Supreme Court. *Kolender v. Lawson,* 103 S.Ct. 1855, 1857 n.3 (1983); *Swisher v. Brady,* 438 U.S. 204, 213 n.11 (1978); *Ohio Bureau of Employment Services v. Hodory,* 431 U.S. 471, 480 (1977); *Sosna v. Iowa,* 419 U.S. 393, 396-397 n.3 (1975).

doctrine was apposite", BR 31, n.84. This is not correct; the brief referred to specifically cites the eminent domain cases, *Ahrensfeld, Louisiana Power & Light Co.* and *Clark v. Nash,* as well as *Younger,* and other cases. J.A. 151 et seq.

Thus, because the Court of Appeals believed that under its view of the law the public purpose of the Hawaii Land Reform Act could be questioned, a trial on that issue was required. Because such a trial was already in progress in the state court, there were special circumstances requiring abstention.

III

CONDEMNATION WAS A REASONABLE WAY OF REMEDYING CONCENTRATION OF FEE SIMPLE OWNERSHIP OF RESIDENTIAL LAND IN HAWAII

It must be taken as a given that there is a concentration of fee simple ownership of residential land in the hands of a small number of landowners and that the landowners have abused their economic power; the legislature has so found, Portlock A-115-117, 133-135. Only after a trial could a court find otherwise.[9]

The question therefore is what reasonable steps could the legislature take to remedy this situation.[10] We pointed out that this Court has upheld legislative and congressional

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[9]The trial evidence supports the legislative findings, Portlock BR, Ex. A, 31, 65-67, 89, 91-92.

[10]We do not say that the legislature's only purpose was to remedy concentration; we are, for purposes of argument, using this analysis to demonstrate only one of many grounds supporting the constitutionality of the statute.

action requiring divestiture to eliminate similar economic evils. *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117 (1978); *North American Co. v. Securities & Exchange Commission,* 327 U.S. 686 (1946). We read appellees' brief to agree with our interpretation of *Exxon,* BR 73-74, n. 185. They protest, however, that the Hawaii Land Reform Act is not an anti-monopoly or anti-oligopoly act and that the legislature could not constitutionally declare the existence of a monopoly by statutory fiat. BR 73-74, n.185. But we do not make either of those claims here. The statute of Maryland involved in *Exxon* was not an anti-monopoly or anti-oligopoly statute, Art. 56 Annotated Code of Maryland § 157E, cited in *Governor of Maryland v. Exxon Corp.,* 279 Md. 410, 370 A.2d 1102, 1105-1106 (1977). Likewise, we find nothing in the operative provisions of the Public Utility Holding Company Act which relates to either oligopoly or monopoly, 327 U.S. 792, n.7.

The last distinction appellees make is that a taking was not involved in either *Exxon* or *North American,* BR 73 n.185. The "taking" distinction raised by appellees brings us directly to the holding we claim for *Berman v. Parker,* 348 U.S. 26 (1954). It is that if the object of Hawaii Land Reform Act was authorized by the police power, the same object could be realized by the exercise of eminent domain. Appellants contest our reliance on the holding of *Berman* on two grounds: First, that the holding is not as broad as we state it is, and second, that the Court should reexamine *Berman,* BR 76-78. Appellants are wrong on both counts.

That *Berman* holds that exercise of eminent domain can be justified under the police power is evident from reading the lower court decision in *Berman, Schneider v. District*

of Columbia, 117 F.Supp. 705 (D.C. 1953), *aff'd sub nom. Berman v. Parker*, 348 U.S. 26 (1954). One of the issues was stated by the District Court as follows: "Can the Government seize title to land from which a slum has been or could be cleared, and sell it to a private person for private uses?" 117 F.Supp. 716. The court answered this affirmatively by relying on the power of eminent domain. Judge Prettyman stated for the three judge court:

> Moreover, the traditional concept of use as the keystone of eminent domain has been enlarged in modern thought and cases. We find it described as public purpose. The variation in the term from "use" to "purpose" indicates a progression in thought. The idea is that the taking itself, as distinguished from the subsequent use of the property, may be required in the public interest. The Supreme Court has not gone far in that direction, but we think we see it indicated in the Brown and T. V. A. cases, which we have discussed. We so hold.
>
> 117 F.Supp. 716.[11]

Since the Supreme Court determined to affirm this holding of the District Court on the grounds of police power rather than on eminent domain, one can only conclude that the opinion in *Berman* is a square holding that the police power can be used to sustain the exercise of the power of eminent domain.

Next appellants and amicus curiae, Pacific Legal Foundation, argue that all kinds of untoward events will occur if *Berman* continues to be the law, BR 58 et seq. The simple answer is that although the decision in *Berman* is 30 years

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[11]A similar holding was reached in *Puerto Rico v. Eastern Sugar Associates*, 156 F.2d (1st Cir.) *cert. denied*, 329 U.S. 772 (1946).

old, none of the evils foreseen by appellants has in fact occurred. In any event, it should not be reexamined without an evidentiary record.

Finally, we cannot resist pointing out that the Hawaii legislature chose to exercise eminent domain instead of a more drastic remedy to accommodate the Bishop Estate's tax problems, Portlock BR, Ex. 1, 46-47.

IV

APPELLEES' FOURTEENTH AMENDMENT DUE PROCESS ARGUMENT RELIES ON EVIDENCE TO MISCONSTRUE THE STATUTE

Appellees argue that the Hawaii Land Reform Act violates both substantive and procedural due process requirements of the Fourteenth Amendment, BR 82-85.[12] As to substantive due process the holdings of *Exxon* and *Berman* apply. The cases cited by appellees do not detract from *Exxon's* holding that a state has power to deal with the problems of concentration of economic power.[13] Appellees argue, however, that the Act's provisions "have no

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[12]They appear to have abandoned their argument that they were entitled to a trial on the merits.

[13]*Moore v. City of East Cleveland*, 431 U.S. 494 (1977) is distinguished *supra*. *Nectow v. City of Cambridge*, 277 U.S. 183 (1928) held that plaintiff's property was unconstitutionally zoned residential instead of commercial based upon a master's report resulting from a view and a hearing. *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973) held invalid as a denial of equal protection a provision of the Food Stamp Act of 1964 excluding households containing individuals unrelated to other members for the reason that the provision was unrelated to the stimulation of the purchase of farm surpluses. *Zobel v. Williams*, 457 U.S. 55 (1982) held that Alaska's plan to distribute its natural resource income on the basis of length of residence was an invalid denial of equal protection. *Logan v. Zimmerman Brush Co.*, 455

rational connection with . . . eliminating a concentration of land ownership," BR 83. Because the Act expressly provides for the condemnation and acquisition of lands held in concentrated ownership, appellees' argument is either an evidentiary argument or a dispute as to how the statute should be interpreted—or a logomachy. In any event this Court should not resolve this controversy against appellants until Hawaii construes the statute.

Appellees next argue that the Hawaii Land Reform Act delegates standardless authority over eminent domain to private parties who have a pecuniary interest in the property. The statute does not so read; it clearly requires the Hawaii Housing Authority in each case to find, inter alia, after notice and hearing, that the acquisition will effectuate the public purposes of the Act [i.e., elimination of concentration]. Haw. Rev. Stat. § 516-22, Portlock A 140-141. The Housing Authority, and only the Housing Authority, makes these findings; it is not an appellate body. We do not find anything in the opinions below construing the statute other than as above; see, Portlock BR, Ex. 1, 99-101. Further it is not even necessary that the lessee of a particular lot apply to the Housing Authority for purchase in order for that lot to be designated, Portlock BR, Ex. 1, 99. Thus, the cases relied on by Appellants are not in point because in none of those cases did an administrative body make the initial findings after notice and hearing.[14] Rather the

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U.S. 422 (1982) held that an Illinois statute providing for dismissal of claims not timely scheduled for hearing by a commission violated equal protection and due process.

[14] *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928); *Eubank v. City of Richmond*, 226 U.S. 137 (1912). *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) is not in point because under the Hawaii statute the lessees do not make any findings which are then appealed.

Hawaii Housing Authority's function is very similar to that performed by the Securities & Exchange Commission under the Public Utility Holding Company Act. See, *North American Co. v. Securities & Exchange Com'n*, 327 U.S. 686, 792, n.7 (1946).

Recognizing this, appellants assert that ". . . the follow-up hearing is simply a formality, as the evidence introduced below demonstrates (JA 162-165)" BR 84, n.201. This is not only another instance of appellants' urging a facial construction while relying on evidence; it is also wrong as a mere reading of appellants' reference will establish.

CONCLUSION

We respectfully submit that if this Court holds that the Hawaii Land Reform Act does not meet the "minimum rationality" test for review, the matter be remanded with directions to stay proceedings pending termination of the parallel action in the Hawaii state court.

Respectfully submitted,

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